



Billing Code: 8025-01

## SMALL BUSINESS ADMINISTRATION

### 13 CFR Part 121

Docket No. SBA-2016-0004

Small Business Size Standards

AGENCY: U.S. Small Business Administration.

ACTION: Statement of General Policy, SBA Size Policy Statement No. 3.

SUMMARY: The Small Business Administration (SBA) hereby gives notice of its intended application and interpretation of the interaffiliate transactions exclusion from annual receipts set forth in its Small Business Size Regulations. Effective at the issuance of this notice, SBA will apply the exclusion to properly documented transactions between a concern and its domestic or foreign affiliates, regardless of the type of relationship that resulted in the finding of affiliation.

#### DATES:

Effective Date: This Policy Statement is effective May 24, 2016.

Comment Date: Comments must be received on or before July 25, 2016.

ADDRESSES: You may submit comments, identified by Docket No. SBA-2016-0004 by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail or Hand Delivery/Courier: Brenda Fernandez, U.S. Small Business Administration, Office of Government Contracting, 409 3rd Street SW, 8th Floor, Washington, DC 20416.

SBA will post all comments on <http://www.Regulations.gov>. If you wish to submit confidential business information (CBI) as defined in the User Notice at <http://www.Regulations.gov>, please submit the information to Brenda Fernandez, U.S. Small Business Administration, Office of Government Contracting, 409 3rd Street SW, 8th Floor, Washington, DC 20416, and highlight the information that you consider to be CBI and explain why you believe this information should be held confidential. SBA will review the information and make a final determination of whether the information will be published or not.

FOR FURTHER INFORMATION CONTACT: Brenda Fernandez, U.S. Small Business Administration, Office of Government Contracting, 409 3rd Street SW, 8th Floor, Washington, DC 20416; (202) 205-7337; [brenda.fernandez@sba.gov](mailto:brenda.fernandez@sba.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

Under 13 CFR 121.104(d), the average annual receipts size of a business concern with affiliates is calculated by adding the average annual receipts of the business concern with the average annual receipts of each affiliate. However, in adding the receipts of a concern with its affiliate, SBA excludes “proceeds from transactions between a concern and its domestic or foreign affiliates,” under 13 CFR 121.104(a). These transactions are commonly referred to as interaffiliate transactions. The intent of this exclusion is to avoid counting the same receipts twice when determining the size of a particular concern. This Statement of Policy explains how SBA will apply the exclusion.

Recent SBA size determinations and decisions of the Office of Hearings and Appeals have limited the exclusion by applying it only to transactions between affiliates

that are eligible to file a consolidated tax return. This interpretation has been supported by reference to a parenthetical that was included with section 121.104(a) from 1996 to 2004, providing that the exclusion would apply to interaffiliate amounts “(if also excluded from gross or total income on a consolidated return filed with the IRS). . . .” 13 CFR 121.104(a)(1) (1996); 61 FR 3280 (Jan. 31, 1996). While this parenthetical was in place, SBA excluded only those interaffiliate transactions that were also excluded from consolidated tax returns filed by a concern and its affiliate. This policy necessarily required that the transaction occur between two firms that filed consolidated returns.

SBA deleted the parenthetical in 2004. In the preamble to the final rule issued May 21, 2004, SBA stated that it was deleting the parenthetical because “[w]hether a consolidated return is filed should have no bearing on whether properly documented interaffiliate transactions are excluded from annual receipts.” 69 FR 29192, 29196 (May 21, 2004). Thus, since May 2004, the regulation has provided for an exclusion from receipts for “proceeds from transactions between a concern and its domestic or foreign affiliates.” 13 CFR 121.104(a). The regulation does not include a limitation on the types of affiliates for which interaffiliate transactions can be excluded, and in no way ties the exclusion to a concern’s ability to file a consolidated tax return with the identified affiliate.

SBA believes that the current regulatory language is clear on its face. It specifically excludes all proceeds from transactions between a concern and its affiliates, without limitation. Moreover, the regulatory history supports the position that the exclusion for interaffiliate transactions is available regardless of the manner of affiliation between a concern and its affiliate. SBA recognized that excluding interaffiliate

transactions only when they are identified on a consolidated tax return often perpetuated the double-counting of receipts. By saying that “[w]hether a consolidated return is filed should have no bearing on whether properly documented interaffiliate transactions are excluded from annual receipts,” SBA did not mean to imply that a concern and its affiliate must be able to file a consolidated tax return in order to receive the exclusion from double-counting interaffiliate transactions. Conversely, SBA was attempting to make clear that it did not support the practice of double-counting receipts between affiliates generally.

Because the regulatory text does not contain a restriction, a regulatory change is not necessary. SBA will consider comments submitted regarding this policy.

### Statement of Policy

SBA will not restrict the exclusion for interaffiliate transactions to transactions between a concern and a firm with which it could file a consolidated tax return. The exclusion for interaffiliate transactions may be applied to interaffiliate transactions between a concern and a firm with which it is affiliated under the principles in 13 CFR 121.103. Where SBA is conducting a size determination, SBA requires that exclusions claimed under section 121.104(a) be specifically identified by the concern whose size is at issue and be properly documented. This policy is effective immediately.

Dated: May 18, 2016.

Maria Contreras-Sweet,  
Administrator.

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